

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

FOR MR. JUSTICE STEPHENS

UNITED STATES
COURT OF APPEALS FOR THE

FILED JUL 17 1936

Monroe Burke

CLERK

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

— |
APRIL TERM, 1936.

—
No. 6745.

—
MARK O. DAVIS, *Appellant.*

v.

MAUDE E. DAVIS, *Appellee.*

—
JOSEPH T. SHERIER,
Attorney for Appellant.

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No. 6745.

MARK O. DAVIS, *Appellant*.

v.

MAUDE E. DAVIS, *Appellee*.

STATEMENT OF FACTS.

This is an appeal from an order of the court below denying the petition of appellant to vacate or modify a decree of that court.

On October 29, 1925, the court below entered its decree, granting the appellant a divorce from bed and board from the appellee, and awarding the custody of the infant daughter of the parties to the appellee. It required appellant to pay monthly the sum of \$300 for the maintenance of the appellee *and the daughter*.

On February 24, 1928, the appellant, then a resident of Arlington County, Virginia, filed his bill in the circuit court thereof, praying that he be granted an absolute divorce from the appellee, upon the ground of her desertion. She was served in the District of Columbia with process of the Virginia court; appeared specially and filed a plea to the jurisdiction of the court, alleging that appellant had not been an actual bona fide resident of the State of Virginia for the period of one year next preceding the commencement of his suit, as required by law. R. pp. 26, 27, 32.

In conformity to its practice, the Virginia court referred the issue thus presented to a commissioner in chancery to take testimony and report. Evidence was given by the appellee and three witnesses produced by her. The appellant offered proof as to the bona fides of his residence. The commissioner found and reported that the appellant was an actual bona fide resident of Arlington County, Virginia, for more than one year before the filing of his suit. The appellee excepted to the report of the commissioner. Her exceptions were argued to the judge, who entered an order overruling them, and adjudging the appellant an actual bona fide resident of the county and state. No appeal was taken from this order. R. pp. 34, 35, 36, 37.

Thereafter testimony was taken on the merits of the cause, seasonable notice of the time and place of each hearing having been given to the appellee. R. p. 23. She did not appear in the cause after the entry of the order confirming the commissioner's report.

On the 26th day of June, 1929, the appellant was granted a final decree of divorce a vinculo matrimonii.

R. p. 22. Under this decree, no allowance by way of alimony was made.

On December 30, 1929, the appellant filed in the Court below his petition, setting up the proceedings had in the Virginia court and praying that the decree of the Court below entered October 29, 1925, insofar as it required the payment of alimony to the appellee for her support and maintenance, be set aside. A hearing was had on petition, ~~and answer filed~~, without testimony, and an order entered denying the prayers of the petition. At the time of the entry of this order, the daughter of the parties was twelve years of age, unmarried, and residing with the appellee.

From that order, an appeal was prosecuted to this Court, which affirmed the judgment. 61 App. D. C. 48.

On July 31, 1932, the daughter of the parties was married, and has since lived with her husband. R. p. 52. The appellant remarried in Alexandria, Virginia, on October 27, 1933. R. p. 53.

The instant petition was filed on the 16th day of April, 1935. It set out the entry of the decree of the court below granting the limited divorce, the proceedings had in the Virginia court, and the marriage of the daughter of the parties. An answer alleged that the appellant was not an actual bona fide resident of the State of Virginia at the date of the filing there of his bill for divorce, and that the Virginia court did not acquire jurisdiction of the cause. The answer did not set up or claim that the judgment of this Court on the former appeal was res judicata of the questions presented. Appellant moved to strike the answer on the ground that the defense relied upon was not available to the appellee because of the deci-

sion of the Virginia court. The motion to strike was denied on the ground that, although the appellee had submitted to the Virginia court the question of the domicile of the appellant, and was bound by its decision in that respect, she had not submitted the merits of the cause to that court, and the decree of the Virginia court was not *res judicata* on the question of the matrimonial domicile, nor upon the merits of the cause. A motion for rehearing of the motion to strike was thereafter denied. R. p. 56.

Subsequently, the cause came on for hearing on the merits. Counsel for appellee thereupon orally requested the court to continue the cause on the ground that he desired to offer the testimony of the appellee and three witnesses, (none of whom were in attendance upon the court) to the effect that the appellant was not an actual bona fide resident of Arlington County, Virginia, but had removed to that place for the sole purpose of obtaining a divorce. Appellant objected to the continuance on the ground that it was not seasonably made, did not comply with the requirements of Rule 44 of the court below, and upon the further ground that he would admit that the witnesses, if present, would testify as stated. He claimed, however, that such testimony would be incompetent, in view of the adjudication of the Virginia court. Rule 44 follows:

“1. An application for a continuance shall be by motion supported by sufficient affidavit disclosing the grounds therefor, unless such affidavit be waived by opposing counsel. In order to be entertained such motion and affidavit shall be filed as long before the calling of the cause for trial, as reasonable diligence requires.

“2. If the application be because of the absence of a witness, the affidavit shall set forth what ma-

terial matter such witness is expected to testify to; and if the adverse party admits that such witness if present would so testify, the court may proceed with the trial, requiring such admission therein.

“3. All continuances shall be in the sound discretion of the court, and shall be at the cost of the applicant unless otherwise ordered.”

The appellant offered in evidence the proceedings in the court below, as well as those in the Virginia court. R. pp. 52, 53, 56. No testimony, other than the above admission, supported the answer. Thereupon, the court denied the petition on the ground that the questions presented were controlled by the decision of this Court on the previous appeal. Upon this action of the court the appellant bases the following

ASSIGNMENTS OF ERROR:

1. In holding that the decision of the Court of Appeals on the former appeal herein is *res adjudicata* of the question here presented.

2. In holding that the Court of Appeals on the former appeal herein decided that the Virginia decree of absolute divorce did not have the effect of annulling or vacating the decree of this Court granting the wife alimony.

3. In holding that the emancipation of the daughter of the parties by her marriage on July 31, 1932, furnished no ground for reducing the allowance made by the decree of October 29, 1925, for the support of the wife and daughter.

4. In refusing to give full faith and credit to the decree of the Virginia court entered June 26, 1929, grant-

ing the plaintiff an absolute divorce from the defendant, without alimony.

5. In refusing to recognize and give effect, under the doctrine of comity, to the decree of the Virginia court awarding the plaintiff an absolute divorce from the defendant without alimony.

6. In denying the prayers of plaintiff's petition to vacate or modify the decree of October 29, 1925, and in refusing to vacate or modify such decree.

7. In holding that the absolute divorce granted the plaintiff from the defendant by the Virginia decree of June 26, 1929, did not when presented to this Court, relieve the plaintiff of further obligation to support the defendant or to comply with the decree of this Court of October 29, 1925.

8. In holding that the Virginia absolute divorce obtained by the plaintiff from the defendant did not furnish any ground for setting aside or modifying the decree of October 29, 1925, with respect to the maintenance by that decree awarded the defendant.

9. In entering the decree of April 1, 1936, denying the prayers and dismissing plaintiff's petition to vacate or modify the decree of October 29, 1925.

ARGUMENT.

Assignments of Error 1 and 2.

The first and second assignments of error question the correctness of the ruling below to the effect that the decision of this Court on the former appeal is final and res judicata of the issues here presented.

It will be observed that the former judgment of this

court is not pleaded as a defense nor was it offered in evidence in the hearing below. The general rule is that in order to be available as a defense a prior judgment must be pleaded and proved. In *Southern Pacific R. Co. v. United States*, 168 U. S. 1, 57, it is said:

“Undoubtedly, there are cases in which a party may lose the benefit of a prior judgment, in respect of matters determined by it, when, having an opportunity to plead such judgment, he fails to do so.”

Likewise, in *Graff Furnace Co. v. Scranton Coal Co.*, 266 Fed. 798, 801, (C. C. A. 3) it was stated:

“In the present suit the defendant interposed no answer, but filed an affidavit of defense, intended only to raise questions of law. This affidavit is couched in the most general language, and in no way suggests the defense of res adjudicata. Such a defense should be both pleaded and proved. *Southern Pac. R. Co. v. United States*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. ed. 355; *United States v. Bliss*, 172 U. S. 321, 19 Sup. Ct. 216, 43 L. ed. 463; *Delaware, L. & W. R. Co. v. Kutter*, (C. C. A. 2) 147 Fed. 51, 77 C. C. A. 315.”

See also *Fetherbone Co. v. DeCamp*, 154 Fed. 198; *City of Aurora v. West*, 7 Wall. 82; *Mount City Co. v. Castleman*, 171 Fed. 520; *Bryar v. Campbell*, 177 U. S. 649; *Wagenhurst v. Wineland*, 22 App. D. C. 356, to like effect.

The only suggestion of proof on the part of the appellee was the offer of counsel to prove by four witnesses that the appellant never became an actual bona fide resident of Arlington County, Virginia. Not a single word of proof was offered to show that the for-

mer judgment of this Court was res judicata of the matters then before the lower court. In other words, there was neither pleading nor proof of the prior judgment of this Court. Hence, it would seem to follow that the court below did not have before it and was without power to pass upon that question. It had been waived by appellee's failure to allege or prove it. Matters not before the court ordinarily cannot be made the basis of its decision.

Aside from the failure of the appellee to plead and prove the prior judgment, it is believed that judgment was not conclusive for all time upon the rights of the parties. Section 73 Title 14 of the Code of the District of Columbia provides: "*After a decree of divorce in any case granting alimony and providing for the care and custody of children, the case shall still be considered open for any future orders in those respects.*" The right of the court under this section to entertain motions or petitions seeking the modification of its decrees awarding alimony is clearly a continuing power. There is a marked distinction between the present petition and that which was formerly before this court, in this—the daughter of the parties, for whom provision was made in the original decree, is shown to have since married and is now being supported by her husband. This fact was not before this court on the former appeal. Thus the circumstances of the parties have changed so as to confer upon the courts not only the power, but the duty, to consider the cause anew.

Even before the adoption of the Code, the courts of this District held that in a divorce proceeding the jurisdiction of the court was continuing for the purpose of modifying its decrees with respect to alimony. Thus,

in *Alexander v. Alexander*, 13 App. D. C. 334, 351, 356, it was contended that because the decree did not authorize the husband to apply for a reduction of the alimony awarded the wife, the court was without power so to do. In declining to adopt such a rule, this Court stated:

“In proceedings for divorce the jurisdiction of the courts is in some things necessarily continuous. In the case of the custody and maintenance of the children of the unhappy marriage the court must necessarily retain a continuous jurisdiction. The enforcement of the payment of alimony implies a continuous jurisdiction. * * * We think that a decree for the payment in payments periodical and of indefinite continuance was necessarily a decree for continuing superintendence by the courts, and which, therefore, for good cause accruing afterwards, the court might properly modify, so far as concerned its future execution.”

Also see *Davis v. Davis*, 61 App. D. C. 48, 50.

In addition to the foregoing, a reading of the opinion of this Court on the former appeal will show that it did not then pass upon the validity of and the effect to be given the Virginia decree in the courts of this District. There it was said:

“Therefore, according to the statutes of the District of Columbia, the lower court, after passing the decree of divorce in the case, retained jurisdiction of the parties and the cause with authority to enter further and additional orders therein respecting the alimony of the wife and the care and custody of the minor daughter. The court accordingly was invested with authority to continue and enforce its orders already entered in these respects. The removal of appellant's residence to the State of Virginia, even if lawfully accom-

plished, cannot invest the courts of that state with authority to annul or supersede such jurisdiction."

As further evidence of the fact that this court did not consider the question of the credit to be given the Virginia decree, it will be observed that the Court cited in support of its conclusion principles dealing exclusively with the question of conflict of jurisdiction between courts of co-equal authority, such as the rule to the effect that the court first acquiring jurisdiction of the subject matter would be allowed to pursue it to the end. This Court was doubtless lead to so view the cause by the repeated assertions of the appellee that the Virginia decree was not considered or passed upon by the lower court and that the question of the effect to be given it was not then before this Court for decision. The brief of the appellee on the former appeal is largely devoted to argument to that end. R. pp. 54, 55, 56.

Having by means of the contentions above indicated, induced such action of this Court, is the appellee now to be permitted to reverse her position and urge upon the Court that those questions were then considered and finally adjudicated in her favor? May a party, in judicial proceedings, thus change his ground from time to time as it may suit his purpose?

Va.-Carolina Co. v. Kirven, 215 U. S. 252.

Leonard v. Schall, 132 Minn. 446.

Burlen v. Shannon, 99 Mass. 200.

In determining what issues were presented and decided in the former proceeding, recourse may be had to the opinion of this Court, as well as extrinsic evidence. *Nalle v. Oyster*, 36 App. D. C. 36.

In *Oklahoma v. Texas*, 256 U. S. 70, 88, it was observed:

“What was involved and determined in the former suit is to be tested by an examination of the record and proceedings therein, including the pleadings, the evidence submitted, *the respective contentions of the parties*, and the findings and opinion of the court.”

In *Russell v. Place*, 94 U. S. 606, 608, the court announced the following rule:

“It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. *But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit.* If there be *any uncertainty on this head in the record*—as, for example: if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved, and determined.”

In *Packet Co. v. Sickles*, 5 Wall. 580, 592, the rule is thus stated:

As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judg-

ment is used in pleading as a technical estoppel or is relied on by way of evidence as conclusive, per se, it must appear, by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined; that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence aliunde, consistent with the record, may be received to prove the fact; *but, even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded.*

In *St. Joseph Union Depot Co. v. Chicago, R. I. & P. Ry. Co.*, 89 Fed. (C. C. A.) 648, 653, it was held that where a judgment is affirmed on appeal, but the appellate court construes the pleadings, and holds that but a single issue is tendered thereby, other matters, though pleaded and taken into consideration by the trial court, are not concluded by the judgment.

From a consideration of the language of the opinion of the Court on the former appeal, the authorities there cited, *the contentions of the appellee then made* (R. pp. 54, 55, 56), to the effect that the validity of and credit to be given the Virginia decree were not before the Court, and the failure of the appellee to offer herein any evidence as to the question actually decided on the former appeal, it is believed to be reasonably clear that this Court did not then consider and decide those questions. Furthermore, it is apparent that appellee

did not herself regard the prior decision as *res judicata* of the issue here presented, otherwise she would surely have pleaded that judgment as a bar here.

Assignment of Error 3.

The third assignment of error is based upon the holding of the trial court that the emancipation of the daughter of the parties by her marriage furnished no ground for reducing the allowance of alimony to the appellee.

The decree of October 29, 1925 required the appellant to pay monthly \$300.00 for the support of the appellee and *the daughter*. R. pp. 19, 20. This change in the circumstance of the parties, it is believed, justified and required a reduction of alimony. The marriage of the daughter operated as her emancipation and relieved the appellant of any further obligation to support her. That such is the legal effect of the marriage of an infant female is shown by the following authorities:

Aldrich v. Bennett, 63 N. H. 415,
Commonwealth v. Graham, 157 Mass. 73,
Sherburne v. Hartland, 37 Vermont 528,
Nightingale v. Withington, 15 Mass. 272,
Corey v. Corey, 19 Pick. (Mass.) 29,
Hollingsworth v. Swedenborg, 47 Ind. 378,
Varney v. Young, 11 Vermont 258,
Johnson v. Gibson, 4 E. D. Smith (N. Y.) 231,
 46 Corpus Juris 1269 and
Perkins v. Westcoat, 3rd Col. App. 338.

Assignments of Error 4, 5, 6, 7, 8 and 9.

As assignments of error four, five, six, seven, eight, and nine all relate to the validity of and effect to be

given to the Virginia decree of absolute divorce in favor of the appellant, they will be considered together.

Since the decree entered by the court below on October 29, 1925 necessarily adjudged that the appellee was guilty of misconduct justifying the appellant in living separate and apart from her, and thus destroyed the matrimonial domicile of the parties, he had the right to acquire a new domicile elsewhere.

Marcum v. Marcum, 61 App. D. C. 332,
Steckel v. Steckel, 118 Va. 198.

On this point the Supreme Court in *Williamson v. Osenton*, 232 U. S. 619, 625, 626, said:

“The only reason that could be offered for not recognizing the fact of the plaintiff’s actual change, if justified, is the now vanishing fiction of identity of person. But if that fiction does not prevail *over the fact in the relation for which the fiction was created* there is no reason in the world why it should be given effect in any other. However it may be in England, that in this country a wife in the plaintiff’s circumstances *may get a different domicil from that of her husband for purposes of divorce is not disputed and is not open to dispute*. *Haddock v. Haddock*, 201 U. S. 562, 571, 572, 50 L. ed. 867, 870, 871, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1. *This she may do without necessity and simply from choice*, as the cases show, *and the change that is good as against her husband ought to be good as against all*. *In the later decisions the right to change and the effect of the change are laid down in absolute terms*. *Gordon v. Yost*, 140 Fed. 79; *Watertown v. Greaves*, 56 L. R. A. 865, 50 C. C. A. 172, 112 Fed. 183; *Shute v. Sargent*, 67 N. H. 305, 36 Atl. 282; *Buchholz v.*

Buchholz, 63 Wash. 213, 115 Pac. 88, Ann. Cas. 1912D, 395. See *Haddock v. Haddock*, supra; *Barber v. Barber*, 21 How. 582, 588, 597, 598, 16 L. ed. 226, 228, 231, 232. *We see no reason why the wife who justifiably has left her husband should not have the same choice of domicil for an action for damages that she has against her husband for a divorce.*"

In *Haddock v. Haddock*, 201 U. S. 562, 583, the Court, in discussing the right of the innocent spouse to establish a separate domicile, said:

"Of course, the rigor of the English rule as to the domicile of the husband being the domicile of the wife is not controlling in this court, in view of the decisions to which we have previously referred, recognizing the right of the wife, for the fault of the husband, to acquire a separate domicile."

This Court, in *Rollings v. Rollings*, 60 App. D. C. 305, 307, said:

"Undoubtedly the wife may establish a different domicile from that of her husband for purposes of divorce. *Williamson v. Ostenton*, 232 U. S. 619, 625, 34 S. Ct. 442, 58 L. Ed. 758. And this right is absolute whenever it is necessary or proper that she should do so. It springs from necessity, and endures as long as the necessity. In such cases, the legal fiction that the domicile of the husband is the domicile of the wife does not apply, and, when conditions require her to leave the home, or when she is driven from it and goes into another state for the purpose of there permanently residing, *she acquires a domicile in the latter which may entitle her to sue for divorce.*"

Thus in *Cheever v. Wilson*, 9 Wall. 108, 123-124, the court, in discussing the question of the wife's right to establish a new domicile, said:

“It is insisted that Cheever (the husband) never resided in Indiana; that the domicile of the husband is the wife's, and that she cannot have a different one from his. The converse of the latter proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so. * * * The proceeding for a divorce may be instituted where the wife has her domicile, the place of the marriage, of the offense, and the domicile of the husband are of no consequence.”

In *Barber v. Barber*, 21 How. 582, 594, the court, in quoting from Bishop on Marriage and Divorce, said:

“If he commits an offense which entitles her to have the marriage dissolved, she is not only discharged thereby immediately, and without a judicial determination of the question, from her duty to follow and dwell with him, but she must abandon him, or the cohabitation will amount to a condonation, and bar her claim to the remedy. In other words, she must establish a domicile of her own, separate from her husband, though it may be, or not, in the same judicial locality as his. Courts, however, may decline to recognize such a domicile in a collateral proceeding—that is, a proceeding other than a suit for divorce. But where the wife is plaintiff in a divorce suit, it is the burden of her application, that she is entitled through the misconduct of her husband, to a separate domicile. So when parties are already living under a judicial separation, the domicile of the wife does not follow that of the husband.”

Most of the cases on this question involve the right of the wife to acquire a new domicile, but no sound reason is apparent why the same right should not be extended to the husband. In *Hunt v. Hunt*, 72 N. Y. 217, 243, it is directly decided that the rule applies with equal force to the husband.

The jurisdiction of the Circuit Court of Arlington County, Virginia in the matter of divorces where the complaining party is a resident of that state and county, and the manner of obtaining jurisdiction over non-resident defendants is specifically conferred by Secs. 5103 and 5108 of the code of general laws of that state. Upon the filing by the appellant of his bill for divorce in the Virginia court, process was served upon the appellee in this District in strict conformity with the provisions of the statute. She appeared specially and pleaded to the jurisdiction of the court, alleging that the appellant was not, at the time of the filing of his bill, an actual bona fide resident of the state. The issue was referred to a Commissioner in Chancery who took testimony, including that of the appellee and three witnesses produced by her. He found and reported that the appellant was an actual bona fide resident of the county and state at the date of the filing of his bill. Appellee's exceptions to the report were argued and overruled. No appeal was prosecuted from the order overruling the exceptions. R. pp. 26, 32, 34, 35, 36, 37.

The jurisdiction of the Virginia court over the subject matter of the appellant's suit being beyond dispute, and the actual bona fide residence of the appellant within the state for one year preceding the filing of his bill having been conclusively established in a

proceeding to which the appellee was a party and in which she participated, it would seem to follow that the judgment of the Virginia court was regular in all respects and entitled to such faith and credit in this District as it would be accorded in the courts of Virginia.

It was argued below that since the appearance of the appellee was not general, but for the sole purpose of raising the question of the jurisdiction of the court, she is not bound by the judgment on the merits. This question, however, has been decided adversely to her contention in *Baldwin v. Iowa State Travelling Men's Association*, 283 U. S. 522, 525, in which it appeared that a special appearance was entered for the purpose of testing the jurisdiction of the trial court. The issue was heard on affidavits, and the jurisdiction of the court upheld. The defendant, as here, took no further part in the proceeding and judgment on the merits was rendered against it. In a suit in another jurisdiction upon that judgment, the question of the jurisdiction of the court was again challenged. In ruling that the adjudication on that question was conclusive, the Supreme Court said:

“The substantial matter for determination is whether the judgment amounts to res judicata on the question of the jurisdiction of the court which rendered it over the person of the respondent. It is of no moment that the appearance was a special one expressly saving any submission to such jurisdiction. That fact would be important upon appeal from the judgment, and would save the question of the propriety of the court's decision on the matter even though after the motion had been overruled the respondent had proceeded, subject

to a reserved objection and exception, to a trial on the merits. * * * The special appearance gives point to the fact that the respondent entered the Missouri court for the very purpose of litigating the question of jurisdiction over its person. It had the election not to appear at all. If, in the absence of appearance, the court had proceeded to judgment and the present suit had been brought thereon, respondent could have raised and tried out the issue in the present action, because it would never have had its day in court with respect to jurisdiction. * * * It had also the right to appeal from the decision of the Missouri district court, as is shown by *Harkness v. Hyde*, 98 U. S. 476, 25 L. ed. 237, *supra*, and the other authorities cited. It elected to follow neither of those courses, but, after having been defeated upon full hearing in its contention as to jurisdiction, it took no further steps, and the judgment in question resulted.

“Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.”

American Surety Co. v. Baldwin, 287 U. S. 156, 166.

The rule of the Supreme Court, as well as of this Court, being that the party in whose favor a decree of separation is granted may acquire a domicile different from that of the guilty party; it having been judi-

cially determined that the appellant had been an actual bona fide resident of Arlington County, Virginia for at least one year before the filing of his bill in that State; and there being no showing of fraud or that the proceedings in the Virginia court were not in strict conformity to the requirements of its statutes as to notice to the appellee, etc., their regularity must be presumed (*Galpin v. Page*, 18 Wall. 350, 365) and the decree accorded such finality and conclusiveness as to entitle it to full effect in the courts of this District.

In *Atherton v. Atherton*, 181 U. S. 155, 172, the husband had obtained a divorce in Kentucky on the ground of the wife's desertion. Thereafter the wife sued for a divorce in New York on the ground of cruelty. The husband appeared and set up in bar of her action the Kentucky decree. The New York court held that since the wife was not personally served with process and did not appear in the Kentucky proceeding, the decree in favor of the husband was not binding upon her or entitled to recognition in New York. The Supreme Court, in reversing this decision, held that since the Kentucky court had jurisdiction to entertain the bill for divorce filed by the husband, the merits of the decree of that court could not be drawn in question in the New York proceedings. On that subject, the court said:

“We are of opinion that the undisputed facts show that such efforts were required by the statutes of Kentucky, and were actually made, to give the wife actual notice of the suit in Kentucky, as to make the decree of the court there, granting a divorce upon the ground that she had abandoned her husband, as binding on her as if she had been served with notice in Kentucky, or had voluntarily

appeared in the suit. Binding her to that full extent, it established, beyond contradiction, that she had abandoned her husband, and precludes her from asserting that she left him on account of his cruel treatment.”

Likewise, in *Cheeley v. Clayton*, 110 U. S. 701, 705, it is said:

“The courts of the state of the domicile of the parties doubtless have jurisdiction to decree a divorce, in accordance with its laws, for any cause allowed by those laws, without regard to the place of the marriage, or to that of the commission of the offense for which the divorce is granted; and a divorce so obtained is valid everywhere. * * *

If a wife is living apart from her husband without sufficient cause, his domicile is in law her domicile and, in the absence of any proof of fraud or misconduct on his part, a divorce obtained by him in the state of his domicile, after reasonable notice to her, either by personal service or by publication in accordance with its laws, is valid, although she never in fact resided in that state. *Burten v. Shannon*, 115 Mass. 438; *Hunt v. Hunt*, 72 N. Y. 218. But in order to make the divorce valid, either in the state in which it is granted or in another state, there must, unless the defendant appeared in the suit, have been such notice to her as the law of the first state requires.”

In *Thompson v. Thompson*, 226 U. S. 551, 566-567, a Virginia decree of divorce was held to have annulled a local decree for maintenance. The court stated:

“This being so, it is clear that the resulting decree is entitled, under the Act of Congress, to the same faith and credit that it would have by law or usage in the courts of Virginia. As the laws of

that state provide for a divorce from bed and board for the cause of desertion, and confer jurisdiction of suits for divorce upon the circuit courts; * * * and since the courts of Virginia hold upon general principles that alimony has its origin in the legal obligation of the husband to maintain his wife, and that although this is her right, she may by her conduct forfeit it, and where she is the offender, she cannot have alimony on a divorce decreed in favor of the husband * * * it is plain that such a decree forecloses any right of the wife to have alimony or equivalent maintenance from her husband under the law of Virginia.

“From this it results that the Court of Appeals of the District of Columbia correctly held that the Virginia decree barred the wife’s action for maintenance in the courts of this District.”

In *Bloedorn v. Bloedorn*, 64 App. D. C. 199, 201, a decree of the lower court, awarding maintenance to the wife was vacated upon a showing that the husband had subsequently obtained an absolute divorce in Virginia. In affirming the action of the lower court, this Court said:

“While the decree appealed from in form merely dismisses a motion and discharges a rule in respect of a small amount of alimony then accrued, in legal effect it operates to vacate the provision made for the wife by recognizing that she is no longer wife, because of the Virginia decree, and the Virginia law makes no provision for alimony to a wife against whom a divorce has been granted. *Thompson v. Thompson*, 226 U. S. 551.”

In addition to the constitutional and statutory requirement that full faith and credit be given by the courts of this District to the Virginia decree of divorce in favor of the appellant, it is submitted that under the doctrine of comity heretofore recognized by this Court, that decree should be given full effect here. The appellant, in reliance upon the validity of the Virginia decree, remarried. R. p. 53. The present statute of the District, like that of Virginia, makes desertion a ground for absolute divorce. It is not apparent in what respect the recognition of the Virginia decree would offend against the existing public policy of the District of Columbia. Would it not be more in the interest of public policy to validate appellant's second marriage?

In the recent case of *Atkinson v. Atkinson*, decided by this Court February 10, 1936, a Maryland decree of divorce in favor of the husband was, on the ground of comity, given effect in this jurisdiction, notwithstanding it appeared he had deserted his wife in this District and that service upon her in the Maryland court was obtained by publication, she not appearing or contesting the action. The wife later contracted a second marriage here. This Court, in affirming a decree of the lower court giving effect to the Maryland decree, said:

“Unless, therefore, the giving effect of the Maryland decree would violate the public policy of the District of Columbia, that decree should be allowed to operate. In our view the Maryland decree may be given operation in the District of Columbia without violating the principles of morality or the public policy of the District. * * *

Under the facts it is more in the interest of public policy to validate the remarriage than to set it aside. Moreover, while the District divorce law in effect at the time of the Maryland decree and at the time the decree herein was entered * * * permitted limited divorce for desertion, the present divorce law of the District * * * as amended by the Act of August 7, 1935, authorizes absolute divorce for desertion."

As heretofore argued, it is believed clear that this Court did not, on the previous appeal, consider or determine the validity of or effect to be given the Virginia decree. However, as indicated by the remarks of the court below, he thought there existed some conflict between the ruling in this case and the *Bloedorn* case, *supra*. If, as now contended by the appellee, this Court on the previous appeal held that the Virginia decree was not entitled to recognition in this jurisdiction, then the decision is in conflict with *Bloedorn v. Bloedorn*. It would seem that both decisions cannot consistently stand. Assuming for the purposes of the argument, but not admitting, that this Court did pass upon the validity of and the effect to be given the Virginia decree on the former appeal, then it is respectfully submitted that the conclusion there reached is not in harmony with the earlier and subsequent decisions of this Court on the same subject and consequently should be overruled. In so doing, the Court will establish a definite precedent for the guidance of the court below. The trial judge was in doubt as to which decision was controlling, as will be shown by the record. R. p. 57.

Appellate courts, where they are convinced that an error has been committed which results in injustice

and lays down a principle of law for future guidance which is unsound, do not hesitate to reverse their former ruling. In this connection, see *Johnson v. Cadillac Motor Car Co.*, 261 Fed. 878 and *Chase v. United States*, 261 Fed. 833, 840.

It is accordingly respectfully submitted that the judgment of the court below was erroneous and should be reversed with directions to give effect to the Virginia decree of divorce in favor of the appellant.

Respectfully submitted,

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